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Supreme Court No. 101076-1
(COA No. 82166-1-I)

IN THE SUPREME COURT OF THE STATE OF
WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

ABDULRIZAK YUSUF,

Petitioner.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR KING COUNTY

PETITION FOR REVIEW

NANCY P. COLLINS
Attorney for Petitioner

WASHINGTON APPELLATE PROJECT
1511 Third Avenue, Suite 610
Seattle, Washington 98101
(206) 587-2711

TABLE OF CONTENTS

A. IDENTITY OF PETITIONER 1

B. COURT OF APPEALS DECISION..... 1

C. ISSUES PRESENTED FOR REVIEW 1

D. STATEMENT OF THE CASE 4

E. ARGUMENT 8

 1. Absent evidence Mr. Yusuf viewed Ms. Paux without her knowledge for more than a brief period of time, there is legally insufficient evidence to establish the offense of voyeurism..... 8

 a. Two conflicting Court of Appeals decisions misconstrue the voyeurism statute for different reasons, requiring review 8

 b. The prosecution failed to prove the essential elements under a properly construed statute and as instructed 13

 2. The State’s deceptive destruction of material video evidence and the court’s refusal to remedy the error denied Mr. Yusuf a fair trial and interfered with his right to present a defense 16

 a. The State may not hide or destroy material, relevant, and useful evidence..... 16

b. The State deceived the defense about its possession of material evidence, undercutting its ability to prepare a defense.....	17
c. The court improperly refused to instruct the jury on missing evidence despite acknowledging its material value	19
3. In violation of the rules of evidence and over objection, the court admitted testimony Mr. Yusuf that had condoms in his pocket without assessing the significant prejudicial impact of this evidence	22
F. CONCLUSION	27

TABLE OF AUTHORITIES

Washington Supreme Court

City of Seattle v. Winebrenner, 167 Wn.2d 451, 219 P.3d 686 (2009)..... 8

HJS Dev., Inc. v. Pierce Cty. ex rel. Dep't of Planning & Land Servs., 148 Wn.2d 451, 61 P.3d 1141 (2003) 9

Salas v. Hi-Tech Erectors, 168 Wn.2d 664, 230 P.3d 583 (2010)..... 26

State v. Armstrong, 188 Wn.2d 333, 394 P.3d 373 (2017) 16

State v. Barnes, 153 Wn.2d 378, 103 P.3d 1219 (2005) 19

State v. Davis, 73 Wn.2d 271, 438 P.2d 185 (1968). 20

State v. Delgado, 148 Wn.2d 723, 63 P.3d 792 (2003)..... 8

State v. DeVincentis, 150 Wn.2d 11, 74 P.3d 119 (2003) 26

State v. Fischer, 185 Wn.2d 836, 374 P.3d 1185 (2016) 20

State v. Groth, 163 Wn.2d 548, 261 P.3d 183 (2011) 17

State v. Johnson, 188 Wn.2d 742, 399 P.3d 507 (2012) 15

State v. Martin, 94 Wn.2d 1, 8, 614 P.2d 164 (1980)..... 8, 13

State v. Saltarelli, 98 Wn.2d 358, 655 P.2d 697 (1982)..... 26

State v. Vasquez, 178 Wn.2d 1, 309 P.3d 318 (2013) 14

Tonkovich v. Dept. of Labor & Indus., 31 Wn.2d 220, 195 P.2d 638 (1948)..... 15

Washington Court of Appeals

State v. Espinosa, 8 Wn. App. 2d 353, 438 P.3d 582 (2019).. 19

State v. Fleming, 137 Wn. App. 645, 154 P.3d 304 (2007) 9

State v. Hummel, 196 Wn. App. 329, 382 P.3d 592 (2016) 14

State v. Koch, 157 Wn. App. 20, 237 P.3d 287 (2010) 19

State v. Martell, 22 Wn. App. 415, 591 P.2d 789 (1979)..... 9

State v. Rice, 48 Wn. App. 7, 737 P.2d 726 (1987)..... 25

State v. Stutzke, 2 Wn. App. 2d 927, 413 P.3d 1037 (2018) 2,
10, 11

State v. Yokel, 196 Wn. App. 424, 383 P.3d 619 (2016)..... 20

United States Supreme Court

Arizona v. Youngblood, 488 U.S. 51, 109 S. Ct. 333, 102 L. Ed. 2d 281 (1988)..... 16

Estelle v. Williams, 425 U.S. 501, 96 S. Ct. 1691, 48 L. Ed. 2d 126 (1976)..... 23

In re Winship, 397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970)..... 13, 14

<i>Jackson v. Virginia</i> , 443 U.S. 307, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979).....	14
<i>Michigan v. Bryant</i> , 562 U.S. 344, 131 S.Ct. 1143, 179 L.Ed.2d 93 (2011).....	23
<i>United States v. Salerno</i> , 481 U.S. 739, 107 S.Ct. 2095, 95 L.Ed.2d 697 (1987).....	22

United States Constitution

Fifth Amendment	23
Fourteenth Amendment.....	16, 19, 22, 23
Fourteenth Amendment.....	13
Sixth Amendment.....	16, 19

Washington Constitution

Article I, section 3	13, 16, 22
Article I, section 21	22
Article I, section 22	13, 16, 22

Statutes

RCW 9A.44.115.....	9, 10, 12, 15
--------------------	---------------

Court Rules

ER 403	23, 25
ER 404	23
RAP 13.3(a)(1)	1
RAP 13.4	1, 27

A. IDENTITY OF PETITIONER

Abdulrizak Yusuf, petitioner here and appellant below, asks this Court to accept review of the published Court of Appeals decision terminating review designated in Part B of this petition pursuant to RAP 13.3(a)(2)(b) and RAP 13.4(b).

B. COURT OF APPEALS DECISION

Mr. Yusuf seeks review of the decision by the Court of Appeals dated May 9, 2022, for which the prosecution's motion to publish was granted on June 9, 2022. A copy of the decision is attached.

C. ISSUES PRESENTED FOR REVIEW

1. In this published decision, Division One expressly disagreed with Division Three's construction of the voyeurism statute in *State v. Stutzke*.¹ However, both Court of Appeals decisions misconstrue the plain statutory language requiring a perpetrator to view another person "without the second

¹ 2 Wn. App. 2d 927, 935, 413 P.3d 1037 (2018).

person's knowledge and consent." Should this Court grant review to address this conflict and the errors made by both courts in enforcing the plain language of the statute?

2. Because the Court of Appeals misconstrued the essential elements of voyeurism in the first degree, it affirmed Mr. Yusuf's conviction even though there was no evidence he viewed another person for more than a brief period of time and without that person's knowledge and consent, as the statute requires. Should this Court grant review of this constitutional error?

3. When the State destroys potentially useful evidence in bad faith, it violates due process. Here, a police officer misled the defense about the existence of a video from the incident that would have been reasonably likely to benefit Mr. Yusuf's defense. Should this Court review this deceptive destruction of evidence as a violation of due process and as a matter of substantial public interest?

3. A missing evidence instruction is appropriate when the prosecution does not preserve evidence in its control that would naturally be expected to favor the State. The court refused Mr. Yusuf's request for a missing evidence instruction despite the State's admitted role in blocking his access to a video showing his behavior close in the time to the incident. Should this Court review the court's failure to give a missing evidence instruction and its detrimental impact on Mr. Yusuf's constitutional right to present a defense?

4. The court may not admit evidence that is more prejudicial than probative. Here, the court admitted evidence Mr. Yusuf had a large number of condoms in a pocket at the time of the incident, which had no bearing on the incident at issue and had a strong prejudicial impact. Due to the likelihood the jury used this evidence to infer Mr. Yusuf's propensity to act in an inappropriate sexually opportunistic manner, should this Court review the admission of this evidence?

D. STATEMENT OF THE CASE

Abdulrizak Yusuf was arrested at a Burger King after Haily Paux accused him of poking his head under a bathroom stall in the women's restroom and looking in her direction. RP 992. Ms. Paux said she heard someone enter the bathroom, saw feet in the stall next to her, then saw a man's head come "a little bit but not fully" under the partition between the two stalls. RP 1150, 1160. She immediately said, "This is the women's room, and you need to leave." RP 1155. The man stood up and left without saying anything. RP 1155, 1170. Ms. Paux described the incident as lasting between five and 35 seconds. RP 1155, 1165.

It took the police about 20 minutes to arrive after receiving a 911 call about the incident. RP 989, 992. Ms. Paux had left, but Mr. Yusuf was still there. RP 990. One of the responding officers said Mr. Yusuf had slurred speech and seemed intoxicated. RP 1005. He told Officer Jerrod Bailey he was looking for spiders that he would smoke if he found them.

Id. He also told Officer Bailey he was in the women's bathroom because he was "taking a piss." RP 1005-06.

Officer Bailey said he found a package of condoms in Mr. Yusuf's pocket. RP 1018. Detective Francesca Nix drove Mr. Yusuf to jail. RP 1036. While in the car, she told Mr. Yusuf he was being arrested for voyeurism. RP 1037. Mr. Yusuf said the woman propositioned him and gave him oral sex. RP 1037, 1040. Mr. Yusuf made other comments as well but Detective Nix did not write them down because she only recorded remarks that had a sexual content related to the woman. RP 1049-50.

Detective Douglas Faini started working on the case a few days after the incident. RP 1054. He repeatedly contacted the Burger King to get copies of their video surveillance but never obtained any. RP 1054, 1061, 1064. The Burger King is three blocks from the police station where Detective Faini worked but he did not go to the Burger King to investigate for

several months. RP 1060-61. He never spoke to Ms. Paux. RP 1066.

Two days after the incident, then-sergeant and now-Commander Christian Adams got a message that Burger King had a video from the incident. RP 1077. Before trial, Commander Adams said he went to Burger King “to collect video, and I was not able to get any video after scouring every file that she [the manager] possibly had.” CP 83. He did not write any report mentioning his efforts to get a video from Burger King. CP 97.

At Mr. Yusuf’s trial, Commander Adams testified that he actually received a video from Burger King and watched some of it. RP 1076. He did not see a person who matched the description he received of the suspect. RP 1076, 1078. The video he watched showed people in the counter area and people cleaning. RP 1076. Burger King told him they did not have any other video from the time of the incident. RP 1077.

Commander Adams did not keep this video, copy it, tell the other officers about it, or ask Burger King to save it. RP 1079.

When the defense learned in the middle of trial that Burger King gave Commander Adams a video from the incident, it filed a motion to dismiss. CP 82-88. Mr. Yusuf contended the police disposed of potentially useful evidence in bad faith. *Id.* He alternatively asked the court to give a missing evidence instruction that would permit the jury to infer this evidence would have been favorable to the defense. CP 89-90; RP 1207-08. The court denied both requests. RP 1243-44.

Mr. Yusuf was convicted of voyeurism in the first degree as well as making a false statement to police for giving an incorrect name at the time of his arrest. CP 64, 135-36. He received a sentence near the low end of the standard range. CP 176-79.

E. ARGUMENT

1. Absent evidence Mr. Yusuf viewed Ms. Paux without her knowledge for more than a brief period of time, there is legally insufficient evidence to establish the offense of voyeurism.

a. Two conflicting Court of Appeals decisions misconstrue the voyeurism statute for different reasons, requiring review.

Penal statutes are given “a strict and literal interpretation.” *State v. Delgado*, 148 Wn.2d 723, 729, 63 P.3d 792 (2003). No words may be treated as superfluous or deemed irrelevant. *Id.* Courts “do not have the power to read into a statute that which we may believe the legislature has omitted, be it an intentional or an inadvertent omission.” *State v. Martin*, 94 Wn.2d 1, 8, 614 P.2d 164 (1980).

When a statute’s terms are reasonably capable of more than one interpretation, they are construed in the light most favorable to the accused person, not the prosecution. *City of Seattle v. Winebrenner*, 167 Wn.2d 451, 462, 219 P.3d 686 (2009).

It is “a legislative function to define the elements of a particular crime.” *State v. Martell*, 22 Wn. App. 415, 418, 591 P.2d 789 (1979). A court may not, “in the guise of statutory construction” change a “clearly expressed” disjunctive or conjunctive element. *Id.* The word “and” is conjunctive, so the words or phrases are construed as a joint requirement, not as a separate one. *See HJS Dev., Inc. v. Pierce Cty. ex rel. Dep’t of Planning & Land Servs.*, 148 Wn.2d 451, 474 n.95, 61 P.3d 1141 (2003).

To convict Mr. Yusuf of voyeurism in the first degree, the prosecution had to prove he (1) intentionally and knowingly, (2) viewed another person for more than a brief period of time, (3) for purposes of sexual gratification, (4) without that person’s knowledge and consent, and (5) in a place or under circumstances where the person has a reasonable expectation of privacy. RCW 9A.44.115; *State v. Fleming*, 137 Wn. App. 645, 647, 154 P.3d 304 (2007); CP 109 (Instruction 7).

The element of viewing another person is specifically defined with a “special meaning” for purposes of the offense of voyeurism. *State v. Stutzke*, 2 Wn. App. 2d 927, 935, 413 P.3d 1037 (2018); RCW 9A.44.115(1)(e). The voyeurism statute defines the word “views” as looking upon another person in a way that is “intentional” and of a duration that lasts “for more than a brief period of time.” RCW 9A.44.115(1)(e). It “does not include a momentary or casual observation.” *Stutzke*, 2 Wn. App. 2d at 935. The accused person’s “act of observation must last for more than a brief period of time.” *Id.*

In addition, the accused must knowingly view another person “without that person’s knowledge and consent” to commit first degree voyeurism as charged in this case. RCW 9A.44.115(2)(a)(i).

In *Stutzke*, Division Three parsed this statute to require the viewing occur without either knowledge or consent, but not both. 2 Wn. App. 2d at 936. However, *Stutzke* cited no authority for this reading of the statute and it is belied by the

Legislature’s deliberate use of the word “and” rather than “or.” It also renders the words “knowledge and consent” superfluous, since consent necessarily requires the person have knowledge. *See In re Forfeiture of One 1970 Chevrolet Chevelle*, 166 Wn.2d 834, 841, 215 P.3d 166 (2009) (explaining knowledge is necessary predicate of consent, because to consent, “one must have knowledge of it”).

The Court of Appeals agreed with Mr. Yusuf that *Stutzke* incorrectly interprets “knowledge and consent” by replacing the “and” with “or.” Slip op. at 8-9. Under *Stutzke*, a person could be convicted even if a second person agreed the accused could view them without specific knowledge. Slip op. at 9-10.

But despite rejecting the statutory interpretation in *Stutzke*, the Court of Appeals admitted it would not give a “literal interpretation” to the statute. Slip op. at 10. Instead, it created another interpretation of the statute. It insisted that the lack of “knowledge and consent” asks whether the viewed person “lacked the full knowledge to consent before they were

viewed,” inserting a timing element that does not appear in the statute. Slip op. at 11.

The Court of Appeals is not free to supply its own version of how a statute could be written differently, or to guess at another way it could be written. The Court of Appeals agreed “[t]he statute is unambiguous.” Slip op. at 8. When construing an unambiguous statute, the Court of Appeals’ role is limited to enforcing the plain words in a strict and narrow manner.

To convict Mr. Yusuf of voyeurism in the first degree, the prosecution was required to prove Mr. Yusuf intentionally and knowingly “viewed” another person for “more than a brief period of time,” this viewing was not “casual or cursory,” and this viewing occurred “without the second person’s knowledge *and* consent.” CP 109 (to-convict instruction) (emphasis added); RCW 9A.44.115. Also, the viewing must occur in a place or under circumstances where the person has a reasonable expectation of privacy to qualify as voyeurism. *Id.*

Appellate courts “do not have the power to read into a statute that which we may believe the legislature has omitted, be it an intentional or an inadvertent omission.” *State v. Martin*, 94 Wn.2d 1, 8, 614 P.2d 164 (1980). The voyeurism statute demands a non-brief viewing that occurs without the “knowledge and consent” of the person viewed. This Court cannot strike these statutory requirements or decide that they only apply at short periods of time. This Court should grant review due to the conflicting Court of Appeals decisions and reverse the Court of Appeals’ misapplication of the statute.

b. The prosecution failed to prove the essential elements under a properly construed statute and as instructed.

The burden of proving the essential elements of a crime unequivocally rests upon the prosecution. *In re Winship*, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970); U.S. Const. amend. XIV; Const. art. I, §§ 3, 22. Proof beyond a reasonable doubt of all essential elements is an “indispensable”

threshold of evidence the State must establish to garner a conviction. *Winship*, 397 U.S. at 364.

For evidence to be legally sufficient, a “modicum of evidence” on an essential element is “simply inadequate.” *Jackson v. Virginia*, 443 U.S. 307, 320, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979). Rational inferences from the evidence “must be reasonable and ‘cannot be based on speculation.’” *State v. Hummel*, 196 Wn. App. 329, 357, 382 P.3d 592 (2016) (quoting *State v. Vasquez*, 178 Wn.2d 1, 16, 309 P.3d 318 (2013)).

Consistent with the statutory definition, the to-convict instruction specified the prosecution was required to prove Mr. Yusuf “viewed” another person and this viewing occurred “without the second person’s knowledge and consent.” CP 109. The “parties are bound by the law laid down by the court in its instructions” and “the sufficiency of the evidence to sustain the verdict is to be determined by the application of the instructions,” absent an objection. *State v. Johnson*, 188 Wn.2d

742, 755, 399 P.3d 507 (2012), quoting *Tonkovich v. Dept. of Labor & Indus.*, 31 Wn.2d 220, 225, 195 P.2d 638 (1948).

Here, the prosecution did not prove Mr. Yusuf viewed Ms. Paux for more than a brief period of time *and* without her knowledge, as required by statute and the to-convict instruction. CP 109, 113; RCW 9A.44.115 (2)(a). Ms. Paux knew Mr. Yusuf was looking at her throughout the incident. She heard a person walk into the bathroom, watched the person's feet in the stall next to her, and saw his head as it emerged from under the partition between the stalls. RP 1150, 1154. She reacted quickly, and within five or ten seconds told him "you need to leave" and "[t]his is the women's bathroom." RP 1155, 1170. The man stood up and left without saying anything at all. RP 1155.

Ms. Paux said she noticed Mr. Yusuf as soon as he entered and saw him as soon as his head appeared under the stall. RP 1150, 1154. Ms. Paux also said his viewing was brief. RP 1155. The governing statute demands the viewing occur

without the person's knowledge and consent for more than a brief period of time. This Court should grant review due to the Court of Appeals' erroneous construction of the prosecution's burden of proof and the lack of sufficient evidence.

2. The State's deceptive destruction of material video evidence and the court's refusal to remedy the error denied Mr. Yusuf a fair trial and interfered with his right to present a defense.

a. The State may not hide or destroy material, relevant, and useful evidence.

In a criminal prosecution, the State's actions must "conform with prevailing notions of fundamental fairness." *State v. Armstrong*, 188 Wn.2d 333, 344, 394 P.3d 373 (2017); *see Arizona v. Youngblood*, 488 U.S. 51, 57, 109 S. Ct. 333, 102 L. Ed. 2d 281 (1988); U.S. Const. amend. XIV; Const. art. I, § 3. This requirement includes ensuring that people accused of crimes have "a meaningful opportunity to present a complete defense." *Armstrong*, 188 Wn.2d at 344; U.S. Const. amend. VI; Const. art. I, § 22.

The prosecution is constitutionally mandated to preserve and disclose material exculpatory evidence. *Id.* at 345. It may not hide or destroy potentially useful evidence in bad faith. *Id.* Potentially useful evidence includes items where “no more can be said than that it could be subjected to tests, the results of which might have exonerated the defendant.” *State v. Groth*, 163 Wn.2d 548, 557, 261 P.3d 183 (2011).

b. The State deceived the defense about its possession of material evidence, undercutting its ability to prepare a defense.

The prosecution never told Mr. Yusuf before trial that the police obtained video from the time of the incident in Burger King, reviewed it, and decided not to keep it. CP 83. On the contrary, Mr. Yusuf was repeatedly misled and told the police d repeatedly requested Burger King provide video evidence but never received any related to the incident. CP 83, 95

But during trial, Commander Adams testified went to Burger King and watched the videotape they gave him. RP

1076. This was the only video Burger King had. RP 1077. He decided the videotape was not relevant and did not preserve it or tell others about it, even though he had no firsthand knowledge of the incident. RP 1076, 1079.

Mr. Yusuf filed a motion to dismiss, explaining the State's bad faith destruction of relevant, material evidence. CP 82-88. Alternatively, Mr. Yusuf asked the court to instruct the jury it may draw a negative inference against the prosecution from its failure to preserve this evidence. CP 89-90.

Mr. Yusuf expected the video would have been exculpatory and shown he did not follow Ms. Paux into the restroom but instead entered later, mistaking it for the men's room. CP 84. He also believed the video would have enabled him to impeach the prosecution's witnesses about their whereabouts and behavior. *Id.* Commander Adams deceived the defense in a purposeful manner, which constitutes bad faith. CP 88-89; RP 1242-43.

c. The court improperly refused to instruct the jury on missing evidence despite acknowledging its material value.

The constitutional right to present a defense includes the right to have the jury instructed on the law relevant to the defense. *State v. Koch*, 157 Wn. App. 20, 33, 237 P.3d 287 (2010); U.S. Const. amends. VI, XIV. Due process requires that jury instructions (1) allow the parties to argue all theories of their respective cases supported by sufficient evidence, (2) fully instruct the jury on the defense theory, (3) inform the jury of the applicable law, and (4) give the jury discretion to decide questions of fact. *Id.*

Jury instructions are inadequate where they fail to permit the parties to argue their theories of the case, mislead the jury, or do not properly inform the juries of the applicable law. *State v. Barnes*, 153 Wn.2d 378, 382, 103 P.3d 1219 (2005); *State v. Espinosa*, 8 Wn. App. 2d 353, 360-61, 438 P.3d 582 (2019).

A court's failure to give the jury a defense instruction where it is warranted deprives a defendant of his right to

present a defense. *State v. Yokel*, 196 Wn. App. 424, 433, 383 P.3d 619 (2016). In determining whether the defendant was entitled to the requested instruction, the court must evaluate the evidence in the light most favorable to the defendant. *State v. Fischer*, 185 Wn.2d 836, 849, 374 P.3d 1185 (2016).

A missing evidence instruction directs the jury that they may draw an adverse inference from a party's failure to produce evidence within its control, where the party's interest would naturally have been to produce it. A defendant does not need to show any deliberate action or bad faith by the State to secure this instruction. *State v. Davis*, 73 Wn.2d 271, 276, 438 P.2d 185 (1968).

The court agreed the video could have been "material and relevant," as it could have showed whether Mr. Yusuf followed Ms. Paux into the bathroom and as probative of whether he knew she was in the bathroom when he entered. RP 1240. This would have been "potentially useful" to the defense. RP 1241.

Yet it nonsensically ruled the State never “possessed” the video because Commander Adams decided not to keep it after he watched it. RP 1243. Because the officer did not destroy or lose it, the court ruled no missing evidence instruction “would be appropriate.” RP 1243.

The court also agreed a missing evidence instruction is generally appropriate because “the State has the duty to disclose and preserve all potentially material and favorable evidence.” RP 1243. But it concluded, “the Court will not give the missing evidence instruction” and did not impose any sanction without further comment. RP 1243-44.

The court’s ruling rests on its artificial distinction between evidence the State actively destroyed and evidence someone offered the State but it decided against preserving after reviewing it. There is no actual difference between the State destroying evidence and deciding not to keep evidence it actually possessed before discarding it, particularly when it is the type of evidence that will not be preserved by the owner.

The defense was entitled to an instruction directing the jurors that they may draw an adverse inference from the State's failure to keep this video or notify the defense about it in a timely manner.

This Court should grant review to address the State's responsibility when it receives material useful to the defense and to clarify the availability of a missing evidence instruction, as a matter of substantial public interest and based on the fundamental constitutional rights at issue.

3. In violation of the rules of evidence and over objection, the court admitted testimony Mr. Yusuf had condoms in his pocket without assessing the significant prejudicial impact of this evidence.

Every person accused of a crime is entitled to a fair trial by an impartial jury. *United States v. Salerno*, 481 U.S. 739, 750, 107 S. Ct. 2095, 95 L. Ed. 2d 697 (1987); U.S. Const. amend. XIV; Const. art. I, §§ 3, 21, 22. The right to a fair trial bars the admission of unreliable evidence. *Michigan v. Bryant*,

562 U.S. 344, 370 n.13, 131 S. Ct. 1143, 179 L .Ed. 2d 93

(2011); U.S. Const. amends. V, XIV; Const. art. I, § 3.

The right to a fair trial also includes the right to the presumption of innocence. *Estelle v. Williams*, 425 U.S. 501, 503, 96 S. Ct. 1691, 48 L. Ed. 2d 126 (1976). Implementing the presumption of innocence requires a court to “be alert to factors that may undermine the fairness of the fact-finding process.”

Id.

ER 403 prohibits the admission of evidence that is more prejudicial than probative. In addition, ER 404(b) categorically bars evidence of unrelated acts used to show the “character of a person.” The “forbidden inference” of a person’s propensity to act in conformity with other acts “is rooted in the fundamental American criminal law belief in innocence until proven guilty, a concept that confines the fact-finder to the merits of the current case in judging a person’s guilt or innocence.” *Wade*, 98 Wn. App. at 336.

Mr. Yusuf objected to evidence that he had a package of 12 unused condoms in his pocket when he was arrested. RP 43-44. His behavior did not violate any law and had no bearing on the incident. RP 44. No one claimed he referred the condoms at any time during the incident or afterward. RP 44. Mr. Yusuf did not say anything at all during the incident. RP 44-45. He asked the court to exclude this evidence because his mere possession of condoms did not make the facts of consequence more likely, yet it would have “such a prejudicial impact” on the jury “that they’re not going to be able to give him the benefit of doubt.” RP 45.

The court rejected deemed the condoms admissible for any purpose. RP 47-48. It ruled that “relevant evidence” under ER 401 requires “only a showing of minimal logical relevance.” RP 47. Then it concluded voyeurism requires proof of sexual gratification and said, “I am going to deny [the motion in limine] as to the unused condoms.” RP 48.

The court never addressed the prejudicial effect of this evidence. RP 47-48. It only admitted the evidence based on its minimal relevance, despite Mr. Yusuf's expressed concern about its strong "prejudicial impact." RP 45, 47-48; CP 22-23.

The court misapplied the necessary analysis under ER 403. It admitted this evidence solely because it was minimally relevant, without engaging in a balancing process, yet even highly probative evidence may be outweighed by an unduly prejudicial effect. *State v. Rice*, 48 Wn. App. 7, 13, 737 P.2d 726 (1987).

Here, the evidence had no permissible probative value. Mr. Yusuf simply had condoms in a pocket that he did not use, mention, or refer to in any way. These condoms did not demonstrate his intent when he poked his head under a woman's bathroom stall. It is far more likely that the jury inferred Mr. Yusuf had an outsized propensity for seeking sexual gratification at any opportunity due to the large quantity of condoms with him.

“When evidence is likely to stimulate an emotional response rather than a rational decision, a danger of unfair prejudice exists.” *Salas v. Hi-Tech Erectors*, 168 Wn.2d 664, 671, 230 P.3d 583 (2010). “Weighing the prejudicial effect is especially important for cases involving sexual crimes,” because these are the cases in which prejudice has “reached its loftiest peak.” *State v. DeVincentis*, 150 Wn.2d 11, 24, 74 P.3d 119 (2003) (citing *State v. Saltarelli*, 98 Wn.2d 358, 363-64, 655 P.2d 697 (1982)).

The court improperly admitted this evidence without weighing the likelihood it signaled Mr. Yusuf’s propensity to commit sexual acts or engage in unwanted, opportunistic sexual behavior. This prejudicial evidence should not have been admitted.

This quantity of condoms in a pocket made Mr. Yusuf appear promiscuous, opportunistic, and purposefully ready for sexual encounters. Yet he did not use these condoms or

mention them in any way during the incident and there is no evidence he even remembered having them in a pocket.

This Court should grant review of this error and the Court of Appeals' failure to enforce the rules of evidence.

F. CONCLUSION

Petitioner Abdulrizak Yusuf respectfully requests that review be granted pursuant to RAP 13.4(b).

Counsel certifies this document contains 4357 words and complies with RAP 18.17(b).

DATED this 11th day of July 2022.

Respectfully submitted,



NANCY P. COLLINS (28806)
Washington Appellate Project (91052)
Attorneys for Petitioner
nancy@washapp.org

APPENDIX

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

STATE OF WASHINGTON,)	No. 82166-1-I
)	
Respondent,)	
)	
v.)	
)	
ABDULRIZAK ISAAC YUSUF,)	PUBLISHED OPINION
)	
Appellant.)	
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VERELLEN, J. — To convict a defendant of first degree voyeurism, RCW 9A.44.115(2)(a)(i) requires that the defendant viewed the victim “without that person’s knowledge and consent.” Abdulrizak Yusuf challenges his conviction for first degree voyeurism, arguing the State failed to establish his victim did not know he was viewing her. Understood within its statutory context, “without that person’s knowledge and consent” required that the State prove Yusuf’s victim had not knowingly consented to be viewed. Because the State established Yusuf viewed his victim without her knowledge and consent, as used in the statute, substantial evidence supports his conviction.

Yusuf’s two other challenges are not persuasive.

Therefore, we affirm.

FACTS

H.P. and her boyfriend went to an Auburn Burger King in late November of 2019 for food and for H.P. to use the bathroom. H.P. entered the women’s

bathroom, went into one of the two adjacent stalls, and locked the door. No one else was in the bathroom. After beginning to use the toilet, she heard another person enter the bathroom and then saw person's feet in the adjacent stall were facing the toilet. H.P. was visible through the 14-inch gap between the floor and the bottom of the stall wall.

Abdulrizak Yusuf's face appeared upside down under the partition wall to H.P.'s bathroom stall, surprising her. Yusuf had bent down to look under the stall partition, putting his face beneath the partition. His face was close enough for her to touch it. Yusuf stared at her for about 10 seconds before she reacted. She told him he was in the woman's bathroom and needed to leave. Yusuf did not respond to her and instead looked "up and down [H.P.'s] body."¹ H.P. attempted to move her body "[j]ust, like, inward."² Yusuf stared at H.P. before beginning to raise his head back up "very slowly."³ He left the bathroom after having looked at H.P. for about 35 seconds.

H.P. left the bathroom about one minute later. Yusuf was sitting in a booth. H.P. then spoke with Sapela Angie Iulio, the restaurant manager, to identify Yusuf and explain what happened. Iulio called the police to report the incident. Yusuf left, and Iulio could see him "hiding" outside the restaurant.⁴

¹ Report of Proceedings (RP) (Aug. 24, 2020) at 1160, 1176.

² Id. at 1158.

³ Id. at 1155.

⁴ Id. at 1117.

Several Auburn police officers arrived about 20 minutes later. Yusuf, still outside the restaurant, told one officer he had been in the women's bathroom "to take a piss."⁵ After Officer Francesca Nix told Yusuf he was being arrested for voyeurism, Yusuf claimed to have been in the women's bathroom because H.P. propositioned him and had performed oral sex on him. Officers searched Yusuf's pockets and found a dozen unopened condoms, a rolled-up belt, and his driver's license. The officers needed the license to identify Yusuf because he had been giving them false names.

Several days later, Officer Douglass Faini began investigating the case. He called Burger King and asked for video surveillance footage from the day of the incident. Two days later, Lulio called and said the footage was ready. There were no cameras in the restroom, but cameras monitored the rest of the restaurant. Officer Christian Adams went to Burger King for the video footage. He watched the footage Lulio provided and concluded it was the wrong video because he did not see Yusuf in it. He did not watch any other footage because he was told that video was "all they had."⁶ Officer Adams left without taking any footage, and he did not file a report about his visit.

The State charged Yusuf with one count of first degree voyeurism and one count of making a false statement to a public servant. Pretrial, Yusuf moved to suppress the evidence of the belt and condoms in his pockets. The court denied

⁵ RP (Aug. 19, 2020) at 1006.

⁶ Id. at 1077.

the motion. In response to a motion to disclose all material evidence, the State said it had already done so.

During trial, H.P. testified about the incident. Officer Adams testified about watching video footage at Burger King and deciding not to take it. After both sides rested, Yusuf moved to dismiss the charges against him, arguing the State violated his constitutional right to discovery by not preserving the footage and by not disclosing the existence of the footage Officer Adams viewed. The court denied the motion. Yusuf also requested a missing evidence jury instruction as a remedy for the alleged violation. The court declined to give the instruction.

The jury found Yusuf guilty of both charges. He was sentenced to 15 months incarceration with 36 months of community custody. He was also ordered to register as a sex offender.

Yusuf appeals.

ANALYSIS

I. Substantial Evidence of First Degree Voyeurism

Yusuf argues the State failed to prove he committed first degree voyeurism. Whether the State proved every element of a charged crime presents a constitutional question that we review de novo.⁷

When a defendant challenges the sufficiency of the evidence, we review the evidence presented at trial in a light most favorable to the State to determine “if any rational trier of fact could have found the essential elements of the charged

⁷ State v. Loos, 14 Wn. App. 2d 748, 765, 473 P.3d 1229 (2020) (citing State v. Rich, 184 Wn.2d 897, 903, 365 P.3d 746 (2016)).

crime beyond a reasonable doubt.”⁸ The State can prove its case using direct or circumstantial evidence, which have equal weight.⁹ A challenge to the sufficiency of the evidence “admits the truth of the State’s evidence and all inferences that may be reasonably drawn from them.”¹⁰ But “[i]nferences based on circumstantial evidence must be reasonable and ‘cannot be based on speculation.’”¹¹ Dismissal with prejudice is required when sufficient evidence did not support a conviction.¹²

Yusuf argues the State failed to prove he “viewed” H.P. because he did not look upon her for more than a brief period of time.¹³ An alleged voyeur “views” someone when they intentionally look upon “another person for more than a brief period of time, in other than a casual or cursory manner,” using their own eyes or a device.¹⁴ H.P. testified Yusuf looked at her for about 35 seconds, which included running his eyes up and down her body even after she told him to leave. Yusuf presents no authority that this length of time is, as a matter of law, not “more than

⁸ Id. (internal quotation marks omitted) (quoting State v. Green, 94 Wn.2d 216, 221-22, 616 P.2d 628 (1980) (plurality op.)).

⁹ State v. Fleming, 137 Wn. App. 645, 647, 154 P.3d 304 (2007) (citing State v. Thompson, 88 Wn.2d 13, 16, 558 P.2d 202 (1977)).

¹⁰ State v. Stevenson, 128 Wn. App. 179, 192, 114 P.3d 699 (2005) (citing State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992)).

¹¹ State v. Hummel, 196 Wn. App. 329, 357, 383 P.3d 592 (2016) (quoting State v. Vasquez, 178 Wn.2d 1, 16, 309 P.3d 318 (2013)).

¹² Loos, 14 Wn. App. 2d at 766 (citing State v. Devitt, 152 Wn. App. 907, 913, 218 P.3d 647 (2009)).

¹³ Appellant’s Br. at 12-13.

¹⁴ RCW 9A.44.115(1)(e).

a brief period of time.”¹⁵ Considered in a light most favorable to the State, a reasonable juror could conclude Yusuf “viewed” H.P.

RCW 9A.44.115(2)(a) defines first degree voyeurism:

(2)(a) A person commits the crime of voyeurism in the first degree if, for the purpose of arousing or gratifying the sexual desire of any person, he or she knowingly views, photographs, or films:

(i) Another person without that person’s knowledge and consent while the person being viewed, photographed, or filmed is in a place where he or she would have a reasonable expectation of privacy.^[16]

Yusuf contends the State failed to prove the knowledge and consent element because H.P. “did not describe any period of time where she was viewed without her knowledge” that Yusuf was looking at her.¹⁷ The State argues it need not “prove that [the viewing] was both unknowing and nonconsensual” because RCW 9A.44.115(2) allows for a conviction when a defendant views another “without knowledge or without consent.”¹⁸ Neither argument is persuasive because they do not adequately account for the context of the statute.

¹⁵ See Fleming, 137 Wn. App. at 648 (concluding a voyeur “viewed” his victim when she “had enough time to see [him] looking at her [from over a bathroom stall wall], to yell at him, to tell him she had a cell phone, and to run out of the stall.”)

¹⁶ (Emphasis added.) RCW 9A.44.115(2)(a)(ii) prohibits viewing, photographing, or filming “(ii) [t]he intimate areas of another person without that person’s knowledge and consent and under circumstances where the person has a reasonable expectation of privacy, whether in a public or private place.”

¹⁷ Appellant’s Br. at 13.

¹⁸ Resp’t’s Br. at 14.

We review issues of statutory interpretation de novo.¹⁹ We interpret statutes to identify and carry out the intent of the legislature as shown by the statute's plain meaning.²⁰ A statute's plain meaning is shown by its own terms and by related statutes.²¹ "We assume the legislature 'means exactly what it says,'" and, therefore, cannot add or subtract from an unambiguous statute.²² But individual words should not be interpreted in isolation. The plain meaning of two words used in sequence is sometimes more than the simplest and broadest meaning of those words when viewed individually.²³ The plain and precise meaning of two words used in conjunction is part of the context recognized under the plain meaning rule.²⁴ Thus, although we give criminal statutes "a literal and strict interpretation,"²⁵ a court should be "reluctant to accept

¹⁹ State v. Armendariz, 160 Wn.2d 106, 110, 156 P.3d 201 (2007) (citing State v. J.P., 149 Wn.2d 444, 449, 69 P.3d 318 (2003)).

²⁰ J.P., 149 Wn.2d at 450 (citing Nat'l Elec. Contractors Ass'n v. Riveland, 138 Wn.2d 9, 19, 978 P.2d 481 (1999)).

²¹ Id. (citing Dep't of Ecology v. Campbell & Gwinn, L.L.C., 146 Wn.2d 1, 11, 43 P.3d 4 (2002); State v. Clausing, 147 Wn.2d 620, 630, 56 P.3d 550 (2002) (Owens, J. dissenting)).

²² State v. Delgado, 148 Wn.2d 723, 727, 63 P.3d 792 (2003) (quoting Davis v. Dep't of Licensing, 137 Wn.2d 957, 964, 977 P.2d 554 (1999)).

²³ State v. K.L.B., 180 Wn.2d 735, 742, 328 P.3d 886 (2014) (individual words should not be read in isolation); State v. Roggenkamp, 153 Wn.2d 614, 623, 106 P.3d 196 (2005) (the meaning of words may be indicated or controlled by those with which they are associated).

²⁴ K.L.B., 180 Wn.2d at 742; Roggenkamp, 153 Wn.2d at 623.

²⁵ Delgado, 148 Wn.2d at 727 (citing State v. Wilson, 125 Wn.2d 212, 217, 883 P.2d 320 (1994)).

literal readings with . . . ‘strained consequences,’ especially when they do not align with the statute’s purpose and plain meaning of its text.”²⁶

The legislature enacted the voyeurism statute to protect public safety and general welfare by deterring the conduct being criminalized.²⁷ The statute is unambiguous.²⁸ Thus, our interpretation of the statute’s unambiguous language cannot alter its terms²⁹ or undermine its purpose by adhering to a superficial, literal reading with strained consequences.³⁰

The State interprets the statute by changing the phrase “knowledge and consent”³¹ into “knowledge or consent.”³² We presume the legislature uses “and”

²⁶ State v. Bergstrom, 199 Wn.2d 23, 37, 502 P.3d 837, 845 (2022) (quoting State v. Fjermestad, 114 Wn.2d 828, 835, 791 P.2d 897 (1990)).

²⁷ See State v. Boyd, 137 Wn. App. 910, 916, 155 P.3d 188 (2007) (analyzing RCW 9A.44.115(2) and noting its “purpose is to promote safety and welfare”) (quoting State v. Glas, 147 Wn.2d 410, 422, 54 P.3d 147 (2002)).

²⁸ Fleming, 137 Wn. App. at 648.

²⁹ Delgado, 148 Wn.2d at 727 (quoting Davis, 137 Wn.2d at 964).

³⁰ Bergstrom, 199 Wn.2d 37 (quoting Fjermestad, 114 Wn.2d at 835).

³¹ RCW 9A.44.115(2)(a)(i) (emphasis added).

³² Resp’t’s Br. at 14. We acknowledge Division III of this court interpreted RCW 9A.44.115 like the State. State v. Stutzke, 2 Wn. App. 2d 927, 935-36, 413 P.3d 1037 (2018). But we are not bound by decisions of the other divisions of the Court of Appeals. State v. Smith, 17 Wn. App. 2d 146, 152, 484 P.3d 550 (2021) (citing In re Pers. Restraint of Arnold, 190 Wn.2d 136, 147-49, 154, 410 P.3d 1133 (2018)). The Stutzke court’s interpretation hinged on interpreting the phrase “without knowledge and consent” as “without knowledge or consent,” 2 Wn. App. 2d at 935-36, but this articulation ignores the plain meaning of the critical phrase “without that person’s knowledge and consent.” RCW 9A.44.115(2)(a)(i). While we agree with the court’s ultimate determination that voyeurism was committed when “all [of the viewing] occurred with the victim’s knowledge but not consent,” 2 Wn. App. 2d at 936, we decline to follow Stutzke’s approach. See Delgado, 148 Wn.2d at 727 (courts cannot subtract terms from an unambiguous statute) (quoting Davis, 137 Wn.2d at 964). In addition, the Stutzke court concluded the inaccurate prepositional phrase “without knowledge and consent” modified the

as a conjunction.³³ We read “and” disjunctively only when the legislature clearly intended to do so.³⁴ The State’s interpretation is not persuasive.³⁵ Adopting the State’s interpretation would let a person be convicted of first degree voyeurism even if that person proved that the alleged victim had consented to being viewed

verb “views,” 2 Wn. App. 2d at 935-36, when the accurate statutory phrase “without that person’s knowledge and consent” is grammatically an adjectival phrase modifying the noun “[a]nother person’s.” See The Chicago Manual of Style § 5.176, at 280 (17th ed. 2017) (“A prepositional phrase consists of a preposition, its object, and any words that modify the object. A prepositional phrase can be used as a noun . . . an adverb . . . or an adjective (also called an adjectival phrase).”).

We also note that more grounded than the rules of grammar applied in Stutzke are De Morgan’s laws of logic: “[t]he negation of the conjunction . . . is . . . the disjunction of the negations,” such that not (A and B) = (not A) or (not B). Stephen M. Rice, Leveraging Logical Form in Legal Argument: The Inherent Ambiguity in Logical Disjunction and Its Implication in Legal Argument, 40 OKLA. CITY U. L. Rev. 551, 575 (2015) (alterations in original) (quoting IRVING M. COPI & CARL COHEN, INTRODUCTION TO LOGIC 365 (13th ed. 2009); LAWRENCE M. SOLAN, THE LANGUAGE OF JUDGES 49 (1993)). But the rules of formal logic must be applied within the context of the statute to clarify a drafter’s intent based upon the language used. See Rice, supra, at 589 (“Due to the ambiguity in disjunction, the context within which the disjunction is placed is important: . . . ‘Context matters.’” (quoting Schane v. Int’l Bhd. of Teamsters Union Local No. 710 Pension Fund Plan, 760 F.3d 585, 589-90 (7th Cir. 2014))). Here, we focus on the context.

³³ State v. Kozey, 183 Wn. App. 692, 698, 334 P.3d 1170 (2014) (citing State v. Tiffany, 44 Wash. 602, 603-04, 87 P. 932 (1906)); see Ctr. for Env’t. Law & Policy v. Dep’t of Ecology, 196 Wn.2d 17, 33, 468 P.3d 1064 (2020) (“As a default rule, the word ‘or’ does not mean ‘and’ unless legislative intent clearly indicates to the contrary.”) (quoting Tesoro Refin. & Mktg. Co. v. Dep’t of Revenue, 164 Wn.2d 310, 319, 190 P.3d 28 (2008) (plurality op.)).

³⁴ Id. (citing Tesoro Refin., 164 Wn.2d at 319); State v. McDonald, 183 Wn. App. 272, 278, 333 P.3d 451 (2014) (citing Mount Spokane Skiing Corp. v. Spokane County, 86 Wn. App. 165, 174, 936 P.2d 1148 (1997)).

³⁵ See Glas, 147 Wn.2d at 415 (“If the statute is unambiguous, as it is here, it is not subject to judicial interpretation and its meaning is derived from its language alone.” (citing State v. Chester, 133 Wn.2d 15, 21, 940 P.2d 1374 (1997))).

without their knowledge. Because this interpretation ignores the context, subtracts terms from an unambiguous statute, and results in strained consequences, it is unavailing.³⁶

Yusuf argues the conjunction in “knowledge and consent” means the State is required to prove the victim was viewed completely without her knowledge and without her consent. Thus, he asserts that the State cannot prove H.P. lacked knowledge because she was aware of him while he viewed her. This unpersuasive conclusion relies upon a superficial, literal interpretation.

The statute’s terms do not require that both knowledge and consent be absent simultaneously. The only temporal requirement is that the defendant look upon the victim for “more than a brief period of time.”³⁷ Further, Yusuf reads the terms “knowledge” and “consent” as separate, individual facts whose absence the State must prove. But this reading undermines the statute’s deterrent and public safety purposes by preventing a conviction for first degree voyeurism where a victim is aware of the perpetrator the entire time they are being viewed but never consents to being viewed. Because Yusuf’s literal interpretation would undermine the statute’s efficacy and public safety purpose, it is not persuasive.

RCW 9A.44.115(2)(a)(i) prohibits a person from “knowingly view[ing] . . . [a]nother person without that person’s knowledge and consent.” The statute uses a possessive, thereby linking “that person” (the victim) with their “knowledge and

³⁶ Delgado, 148 Wn.2d at 727 (quoting Davis, 137 Wn.2d at 964); see Fleming, 137 Wn. App. at 648 (explaining “[t]he language of [RCW 9A.44.115] is plain and unambiguous.”).

³⁷ RCW 9A.44.115(1)(e).

consent.” And the use of a possessive with “knowledge and consent” means we assess the absence of knowledge and consent from the alleged victim’s subjective perspective. Thus, we read “that person’s knowledge and consent” as a whole rather than individual words in isolation.³⁸ Read together in context, rather than literally or in isolation, the term “knowledge and consent” means consent by the person being viewed as understood based upon that person’s subjective knowledge of the precise activities anticipated to fall within the scope of the consent.³⁹ The legislature intended to protect people from being viewed surreptitiously without their knowing consent. Therefore, if the State shows either that the person being viewed lacked the full knowledge to consent before they were viewed, or if the State shows the person never consented, then it has proven this element of the voyeurism statute.

Here, the State presented evidence that Yusuf viewed H.P. without her consent. H.P. testified she told Yusuf to leave after she knew he was looking at her. This established she did not consent. In the absence of any consent, there is no need to construe the precise scope of any purported consent based upon

³⁸ K.L.B., 180 Wn.2d at 742 (citing Roggenkamp, 153 Wn.2d at 623).

³⁹ See J.M.S. Farms, Inc. v. Dep’t of Wildlife, 68 Wn. App. 150, 155, 842 P.2d 489 (1992) (In the context of a statute requiring a party to disprove knowledge and consent, “[c]onsent is ‘compliance or approval esp[ecially] of what is done or proposed by another.’ WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY 482 (1971). In order to comply with or approve of something, it is only common sense that one must have knowledge of it.”) (emphasis added) (quoting United States v. 141st St. Corp., 911 F.2d 870, 878 (2nd Cir. 1990)).

H.P.'s knowledge. Thus, the State presented sufficient evidence to establish H.P. was viewed without her knowledge and consent under RCW 9A.44.115(2)(a)(i).

Because the State presented sufficient evidence to establish under RCW 9A.44.115(2) that Yusuf viewed H.P. without her knowledge and consent, and he does not challenge the other elements needed to convict, substantial evidence supported his conviction for first degree voyeurism.

II. Admission of Evidence

Yusuf argues the court abused its discretion by admitting evidence of the dozen condoms in his pockets. He contends both ER 403 and ER 404(b) barred its admission.

As a threshold matter, the State contends Yusuf did not preserve the ER 404(b) issue for review because his objection was limited to relevance and to undue prejudice under ER 403. Yusuf objected to admission of the condom evidence under ER 401, 402, and 403, and he articulated the risk of "prejudice" in the context of his ER 403 argument. He did not object based upon ER 404(b). But, relying on State v. Mason,⁴⁰ Yusuf argues an objection based only upon prejudice is sufficient to preserve this issue for review.

In Mason, our Supreme Court explained "[a]n objection based on 'prejudice' is adequate to preserve an appeal, based on ER 404(b), because it suggests the defendant was prejudiced by the admission of evidence of prior bad acts."⁴¹ But the facts of Mason limit this statement. A defendant argued he was prejudiced by

⁴⁰ 160 Wn.2d 910, 162 P.3d 396 (2007).

⁴¹ Id. at 933.

a range of admitted evidence.⁴² The Supreme Court affirmed this court's conclusion that most of his objections were not preserved for review because his objections at trial were based only on relevance.⁴³ But it concluded the defendant preserved the ER 404(b) issue for evidence about a past sexual encounter because the prejudice objection was made after the trial court admitted the evidence under ER 404(b).⁴⁴ Thus, the preservation exception in Mason is limited to circumstances when the general "prejudice" objection was made to the admission of evidence under ER 404(b).

This rule is also illustrated in State v. Briejer.⁴⁵ In Briejer, the State sought to introduce evidence under ER 404(b) that the defendant participated in extreme sports and was, therefore, lying when filing for worker's compensation.⁴⁶ The defendant objected, arguing the evidence was irrelevant and highly prejudicial.⁴⁷ The court admitted the evidence under ER 404(b).⁴⁸ The State argued the issue was not reviewable because he did not expressly object under ER 404(b).⁴⁹ Relying on Mason, the Briejer court concluded the issue had been preserved for review.⁵⁰

⁴² Id. at 932-36.

⁴³ Id. at 933 n.6.

⁴⁴ Id. at 933-34.

⁴⁵ 172 Wn. App. 209, 289 P.3d 698 (2012).

⁴⁶ Id. at 216.

⁴⁷ Id. at 223.

⁴⁸ Id. at 222.

⁴⁹ Id. at 222-23.

⁵⁰ Id. at 223.

Here, unlike in Briejer, the Mason exception does not apply. The State sought to introduce Yusuf's possession of the condoms to prove an element of first degree voyeurism: that Yusuf viewed H.P. for the purpose arousing or gratifying his sexual desires. The trial court admitted the evidence for this purpose. Because ER 404(b) was not raised by either party or the court as a basis to introduce this evidence, Mason does not apply. Thus, Yusuf has not preserved the ER 404(b) issue for review under RAP 2.5(a) in absence of manifest error affecting a constitutional right. Because evidentiary errors under ER 404 are not of constitutional magnitude,⁵¹ Yusuf has failed to preserve this issue for review.⁵²

Yusuf argues the trial court abused its discretion under ER 403 by admitting evidence he had a dozen condoms in his pocket when he was arrested.⁵³ We review a trial court's decision to admit evidence for abuse of discretion.⁵⁴ A trial

⁵¹ State v. Powell, 166 Wn.2d 73, 84, 206 P.3d 321 (2009) (citing State v. Everybodytalksabout, 145 Wn.2d 456, 468-69, 39 P.3d 294 (2002)).

⁵² RAP 2.5(a).

⁵³ Yusuf also argues the trial court misapplied ER 403 because it "fail[ed] to weigh or balance the prejudicial effect against the probative value" in its oral ruling. Appellant's Br. at 26. But "the rationale for requiring the trial court to weigh its decision on the record . . . is not present in the case of an ER 403 objection." Carson v. Fine, 123 Wn.2d 206, 223, 867 P.2d 610 (1994). Regardless, we assume the trial court makes admissibility decisions in response to the grounds stated after considering all pertinent arguments. State v. Giles, 196 Wn. App. 745, 759 n.6, 385 P.3d 204 (2016) (quoting ER 103(a)); State v. Johnson, 48 Wn. App. 531, 538, 740 P.2d 337 (1987)). Because the parties' briefing and oral arguments discussed ER 403 and the risk of prejudice, e.g., RP (July 30, 2021) at 46 (defense counsel urging the court to "think about the prejudicial value here versus the relevance"), Yusuf's argument is not persuasive.

⁵⁴ State v. Gunderson, 181 Wn.2d 916, 922, 337 P.3d 1090 (2014) (citing State v. DeVincentis, 150 Wn.2d 11, 17, 74 P.3d 119 (2003)).

court abuses its discretion when its decision is based upon untenable grounds or was made for untenable reasons.⁵⁵

Yusuf contends the trial court abused its discretion because the condom evidence “had no permissible probative value,” making its admission unduly prejudicial.⁵⁶ But the State had to prove Yusuf viewed H.P. “for the purpose of arousing or gratifying [his] sexual desire,”⁵⁷ and evidence is relevant whenever it tends “to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.”⁵⁸ Contrary to Yusuf’s assertion, the presence of condoms in his pocket while allegedly committing a sex crime could be probative of whether he was sexually motivated. Because the condom evidence was relevant, the question is whether that relevance was outweighed by the risk of unfair prejudice.

ER 403 allows exclusion of relevant evidence when “its probative value is substantially outweighed by the danger of unfair prejudice.” A court considers the whole case when weighing the risk of unfair prejudice, including

“the importance of the fact of consequence for which the evidence is offered in the context of the litigation, the strength and length of the chain of inferences necessary to establish the fact of consequence, the availability of alternative means of proof, whether the fact of consequence for which the evidence is offered is being disputed,

⁵⁵ Id. (quoting State v. Brown, 132 Wn.2d 529, 572, 940 P.2d 546 (1997)).

⁵⁶ Appellant’s Br. at 27.

⁵⁷ RCW 9A.44.115(2)(a).

⁵⁸ ER 401.

and, where appropriate, the potential effectiveness of a limiting instruction.”^{59]}

ER 403 permits prejudicial evidence and prohibits only unfairly prejudicial evidence.⁶⁰ “Within its context, ‘unfair prejudice’ means an undue tendency to suggest a decision on an improper basis—commonly an emotional one.”⁶¹

Here, the State had to prove Yusuf acted with a sexual motivation, and the condom evidence was probative of that essential element. Yusuf did not dispute he had a dozen condoms in his pocket when arrested. The State had only one other piece of evidence to demonstrate Yusuf acted with a sexual motivation: his statement to Officer Nix that H.P. had invited him into the bathroom for oral sex. But the value of this statement was limited by the fact that no such encounter occurred. The evidence had significant probative value.

Regarding prejudice, the fact of an adult carrying condoms is not, by itself, emotionally loaded. Although the jury may have inferred from the condoms in his pocket that Yusuf was acting to arouse his sexual desires, the possible prejudice from this inference is not unfair because it does not provide an improper basis to find him guilty. Yusuf fails to show the trial court abused its discretion by admitting evidence of the condoms.

⁵⁹ State v. Bedada, 13 Wn. App. 2d 185, 193-94, 463 P.3d 125 (2020) (quoting State v. Kendrick, 47 Wn. App. 620, 628, 736 P.2d 1079 (1987)).

⁶⁰ Carson, 123 Wn.2d at 224.

⁶¹ State v. Cronin, 142 Wn.2d 568, 584, 14 P.3d 752 (2000) (quoting State v. Cameron, 100 Wn.2d 520, 529, 674 P.2d 650 (1983)).

III. Missing Evidence Instruction

Yusuf argues the trial court abused its discretion by denying his request for a missing evidence instruction as a sanction for violating his constitutional right to discovery. Specifically, he contends the State violated his right to discovery by not preserving and disclosing the Burger King video footage Officer Adams viewed and declined to collect.

“To protect a defendant’s due process rights, the State has a duty to preserve and disclose exculpatory evidence.”⁶² This duty extends only to material exculpatory evidence and to “potentially useful” evidence destroyed by the State in bad faith.⁶³ Because Yusuf argues only that the video footage was potentially useful evidence,⁶⁴ his argument fails unless he can establish the State acted in bad faith.

Whether the State acted in bad faith is a question of fact that a defendant must establish.⁶⁵ A defendant must “put forward specific, nonconclusory factual allegations that establish improper motive.”⁶⁶ Here, it is undisputed that the trial

⁶² State v. Koeller, 15 Wn. App. 2d 245, 252, 477 P.3d 61 (2020) (citing State v. Wittenbarger, 124 Wn.2d 467, 475, 880 P.2d 517 (1994)), review denied, 197 Wn.2d 1008, 484 P.3d 1263 (2021).

⁶³ Id. (quoting State v. Armstrong, 188 Wn.2d 333, 345, 394 P.3d 373 (2017)).

⁶⁴ See Appellant’s Br. at 22 (“The video was useful and potentially exculpatory evidence.”).

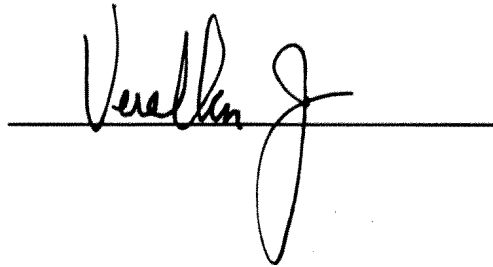
⁶⁵ Koeller, 15 Wn. App. 2d at 253 (citing Armstrong, 188 Wn.2d at 345).

⁶⁶ Armstrong, 188 Wn.2d at 345 (quoting Cunningham v. City of Wenatchee, 345 F.3d 802, 812 (9th Cir. 2003)).

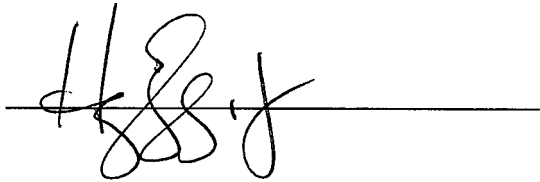
court found “no evidence before this court that the police acted in bad faith.”⁶⁷

Because he has not shown the State acted in bad faith and violated his due process right to discovery,⁶⁸ Yusuf fails to demonstrate the trial court abused its discretion by not providing a missing evidence instruction as a remedy for a discovery violation.⁶⁹

Therefore, we affirm.



WE CONCUR:



⁶⁷ RP (Aug. 25, 2020) at 1241.

⁶⁸ Armstrong, 188 Wn.2d at 345 (“[F]ailure to preserve by the police is not a denial of due process unless the suspect can show bad faith by the State.”) (quoting Wittenbarger, 124 Wn.2d at 477).

⁶⁹ See City of Seattle v. Lange, 18 Wn. App. 2d 139, 154, 491 P.3d 156 (remedy for an alleged constitutional discovery violation warranted only upon a showing of prejudice) (citing In re Pers. Restraint of Brennan, 117 Wn. App. 797, 805 P.2d 182 (2003)), review denied, 198 Wn.2d 1024, 497 P.3d 393 (2021).

DECLARATION OF FILING AND MAILING OR DELIVERY

The undersigned certifies under penalty of perjury under the laws of the State of Washington that on the below date, the original document **Petition for Review to the Supreme Court** to which this declaration is affixed/attached, was filed in the **Court of Appeals** under **Case No. 82166-1-I**, and a true copy was mailed with first-class postage prepaid or otherwise caused to be delivered to the following attorney(s) or party/parties of record at their regular office or residence address as listed on ACORDS:

respondent Amy Meckling, DPA
[amy.meckling@kingcounty.gov]
[PAOAppellateUnitMail@kingcounty.gov]
King County Prosecutor's Office-Appellate Unit

petitioner

Attorney for other party



MARIA ANA ARRANZA RILEY, Paralegal
Washington Appellate Project

Date: July 11, 2022

WASHINGTON APPELLATE PROJECT

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